tory Statement to the Bill seems to declare openly, is a 'major change' in the law. Unfortunately the Explanatory Statement does not give any further useful information to find the real object of the amendment. The last sentence merely states that the object was "to extend the cautioned statement procedure to all criminal investigations and trials" which is again only a half-truth. It is obvious, however, that the new provision was lifted from section 15(1) of the Prevention of Corruption Act, 1961. It is also obvious in my opinion that the intention of the Legislature was to extend and supplement the powers of investigation towards the procurement of evidence to be used in court. The words 'any statement' and the words following them indicate very clearly the intention to supplement the existing law governing admissible evidence to be used in criminal trials. The inclusion of the proviso is only the manifestation of the accepted standards of the rule of law incorporating sections 24 and 25 of the Evidence Act and the Judge's rules. No reason was disclosed in the Explanatory Statement why the Legislature wanted this 'major change.' But that same objective must have also been the motivation behind the sweeping law of regulation 21 of the Essential (Security Cases) Regulations, 1975, a provision dealing with receivable evidence in the trial of a security case. The Essential (Security Cases) Regulations, 1975 were first published in the *Gazette* on October 4, 1975 and the Criminal Procedure Code (Amendment and Extension) Bill 1975 which brought forth among other things the new section 113 was tabled in Parliament on or about December 11, 1975. These two documents must have been drafted about the same time. To construe therefore that because of the absence of a saving provision for section 27 of the Evidence Act in the new section 113 of the Criminal Procedure Code section 27 is therefore repealed or at least "overridden" would in my view amount to a construction which defeats the object of the Legislature. In my view to give full effect to the object of the amendment the police should be given the opportunity to have recourse to either the old section 113 of the Criminal Procedure Code or section 27 of the Evidence Act depending on the circumstances of the case for otherwise the amendment would serve no useful purpose. The new section 113 of the Criminal Procedure Code and section 27 of the Evidence Act are separate and distinct provisions and are complementary to one another and each should be given its full effect.

The statement which the learned President wrongly ruled as inadmissible was the whole of the following statement which appears at page 13 of the record: —

"He told me that he was having a pistol and that it was an automatic pistol and he was also having 7 rounds of .22 ammunition and this pistol was hidden in a heap behind some houses in Pasir Pinji and that he would take me to that place."

Applying *Kottaya's case*[4] it is obvious that the last limb of the statement i.e. "this pistol was hidden behind some houses in Pasir Pinji and that he would take me to the place" is definitely admissible as being a statement within the purview of section 27 of the Evidence Act.

The facts of the case are briefly as follows. The respondent was arrested in Sungei Besar, Teluk Anson and was handed over to the investigating officer (PW2) on October 24, 1975. No one else was arrested with him. During interrogation he made the statement referred to earlier and then led the police party to the spot in Pasir Pinji. The spot was at the foot of a telephone post where there was a small heap of rubbish, stones and mud. According to PW2 the respondent "scattered the earth and dug up the earth and picked up a pistol." In the pistol was a magazine containing seven rounds of .22 ammunition. The pistol was in a brown holster without any cover. The pistol and the ammunition were tested by the armourer, (PW1) and found to be serviceable. PW3 was a detective who acted as interpreter during the interrogation and who also said that the respondent did not have any difficulty in understanding or speaking the Hokkien language being the language used in the interrogation. PW3 also said in evidence that the information was given by the respondent "not very long after questioning". PW4 was another detective who took the three photographs of the spot (page 26 of the record).

The facts established together with the statement admissible under section 27 of the Evidence Act would in my view be sufficient evidence to form a *prima facie* case. It is my view therefore that the respondent should have been called upon to enter his defence to the charges and I now so order. The order of acquittal of the learned President is hereby set aside.

Appeal allowed.

Solicitors: *Thevin, Chandran, Siva & Chong.*

SEPIAH BINTE SULAIMAN v. ABDULLAH BIN MAT AMIN

[O.C.J. (Abdul Razak J.) January 5, 1977]
[Kota Bharu — Civil Suit No. 80 of 1977]

Malay customary law — Harta sepencarian — Presumption.

The plaintiff who was the divorced wife of the defendant claimed as *harta sepencarian* a share in 2 pieces of land at Pasir Mas, Kelantan. The defendant was a padi planter but he denied that the lands were acquired by the joint resources or effort of himself and the plaintiff and claimed that they were inherited from his grandfather.

Held: (1) there is a presumption that if property is acquired during the coverture of the marriage through the joint resources or effort of the parties it is *harta sepencarian*. It can be rebutted by the husband or the wife proving that it was acquired by the sole efforts or resources of one or the other;

(2) in this case on the facts the defendant had not rebutted the plaintiff's claim of *harta sepencarian* and therefore judgment must be given for the plaintiff.

CIVIL SUIT.

Mohamed Dzaiddin Abdullah for the plaintiff.

A. Gomez for the respondent.

Abdul Razak J.: This is an action for *Harta Sepencarian*. The plaintiff was the wife of the defendant who has since been divorced from him. They were married in 1942 till the year 1968. They had no children of the marriage. According to the plaintiff, during its coverture they had acquired 2 pieces

of land Lot Nos. 1318 & 1483 Mukim of Padang Embong, Pasir Mas from their joint resources or effort. He worked as a padi planter. They also jointly acquired a house on Lot 1483 from their joint effort or resources. The defendant in his defence did not deny he was a padi planter and that he was married during the period alleged. But he denied that the land was so acquired. He denied they were *Harta Sepencarian*. He said they were inherited from his grand-father.

The law on *Harta Sepencarian* is fairly clear. The principle has often been laid down at least in Kelantan that there is a presumption that if the property is acquired during the coverture of the marriage through the joint resources or effort of the parties it is *Harta Sepencarian*. It can be rebutted only by the husband or the wife, as the case may be, showing that it was acquired by the sole efforts or resources of one or the other. A circumstance could, therefore, arise to constitute *Harta Sepencarian* when the property might have been acquired solely by the resources of one party and the other merely assisting in a joint effort towards producing the income.

What are the facts bearing on this case? According to the plaintiff, she bought the lands Lots 1318 and 1483 herself on two separate occasions sometime after the war. She was not very definite about the year but made it clear that it was during her marriage. She had two pieces of land Lots 3321 and 2204 other than the lands in dispute before and at the time of the marriage. These were rubber and padi lands. This was admitted by the defendant. Indeed, he admitted to working with her on the rubber land. Indeed, it was out of these lands, according to the plaintiff, that they had derived the income to buy the lands in dispute. This was not an unlikely story. The lands cost her $150 and $100 respectively. She saved about a year to get $100. That was not, in my view, beyond her reach, particularly with Kelantan women, ever so ready and willing always to find ways and means to earn an extra dollar or two to supplement their or the family's income. The rubber land was less than an acre but in the 50s the price of rubber was notoriously known to be higher and, as she said, it was one dollar a katti then. There was evidence she could get about 6 kattis of rubber a day. She did not have to pay for the padi which she planted herself with the husband, the defendant. The defendant would through his own iron-mongering work have added something to their joint income. I do not see, therefore, how it would not be conceivable for her with the value of money being so much higher then, to have saved at least $10 a month. She said she also reared poultry and planted vegetables and remembering that they were married for 26 years it would not have been impossible for her to earn so much as to pay for the lands in question within a year or two after they were married. The plaintiff said the lands were in the defendant's name because at the time of the Land Scheme Enquiry she was pregnant and she could not attend. Her husband went. On his return he explained to her that the land had been registered in his name. She trusted him. That she was pregnant was in fact admitted by the defendant which merely corroborated her explanation why she did not go. That the Land Scheme enquiry took place in 1959 was consistent with her story that she bought the land sometime after 1942, the year of her marriage. Clearly on those evidence there was a presumption, in my view, of *Harta Sepencarian* arising in respect of those lands which called for a rebuttal.

The defendant in his defence was at a loss to explain how he alleged he owned these lands in dispute. According to him, his grand-father was Md. bin Pandok and his grand-mother was Mek Nik binti Musa. The owner of Lot 1483 was Senik bin Basan but he did not explain how his grand-father came to acquire Lot 1483, the one having, it seemed, no relation to the other. The extract of title in the bundle showed the owner to be Senik bin Basan which clearly rebuts any suggestion that the defendant's grand-father or father had anything to do with the land not being Senik's relation unless they had bought it. He said Lot 1318 belonged to his grand-mother Mek Nik. His story was that at the Land Scheme his father told the Land Scheme Officer that he wanted to register the two lands in the defendant's name. He said: "They were not registered in my father's name but he had a right to them." It becomes clear thus that the lands were not inherited from the grand-parents but were supposedly given to him by his father. But this was difficult to believe because he had six brothers and sisters and without any explanation from the defendant as to why the father wanted to give the defendant two pieces of land to the entire exclusion of the others. But there was further confusion and naturally contradiction. At the Land Scheme Enquiry, however, it transpired that his father never gave these lands to him. The record showed that the defendant bought them — one from the father and the other from one Mamat bin Senik. The record also showed that his father was never present in the enquiry in respect of Lot 1483. Therefore, the defendant's allegation that his father told the enquiry officer he wanted the lands to be registered in his son's name was a blatant lie. But there was a more serious fact. By saying that he had bought the lands or had been given them by his father, he virtually contradicted his own pleading that he *inherited* them from his grand-father. It showed clearly therefore that one or the other was not true. It meant simply that the defendant had not proved his case. One would also note that the supposed *inheritance* of Lot 1318 was not even from the grand-father but supposedly from the grand-mother. Naturally, these contradictions and consequent confusion in the defendant's defence called for necessary repairs by him which duly took place. In the midst of the trial, counsel duly asked and was allowed, without objection by the other side, that the word "grand-father" be amended to "grand-parents". But I think the damage was done and no amount of salvage work could save it and the defendant was himself responsible for it. But as if these contradictions were not enough, the defendant took one further step towards discrediting and demolishing himself. He totally denied that he attended the Settlement Enquiry. He said he was outside and knew nothing of what was going on inside. These recordings were, however, part of the agreed bundle. It must be presumed, therefore, to have correctly recorded what transpired. Whether

what the parties said were true or not was of course another matter. Why had the defendant chosen, therefore, to repudiate and disown what he had agreed to be put in. Why had he chosen to go behind what he had said at the Enquiry? The answer to me seems quite simple. It is simply because the Enquiry sought to tell some of the truth if not the whole truth about what had actually happened which was very damaging to him. Because at the Enquiry the lands were said to have been bought by the defendant which merely confirmed the plaintiff's story that she had bought the lands and had asked the defendant to attend because she could not do so. There can be no other reason for his refusal to face his own words. Of course, the enquiry speaks of the lands having been bought one from Mamat, and not as the plaintiff alleged from Awang bin Mamat, and the other from the defendant's father and not as the plaintiff alleged from Mek Nik. And it also speaks of the lands having been bought at the time, which would appear to be, before the marriage. The apparent discrepancy could reasonably and simply, I think, be explained. In respect of Lot 1483 Awang bin Mamat was not present, but the defendant was and gave evidence although he denied it. The extract of title, P(2), showed that the land was still in the name of Senik bin Basan, the grandfather of Awang bin Mamat, and there has been as yet no distribution of the estate of Senik bin Basan. The land technically was therefore still Mamat's *i.e.* Senik's son's land. It was, therefore, more correct for the defendant to say and for the collector to record that the plaintiff and the defendant had bought Mamat's and not Awang's land. Therefore one could, in the circumstances, have just as well said that he bought the land from Mamat as from Awang even more so from Mamat because by right it was still Mamat's land although the consideration for it might have been received by Awang. I believe the defendant would have done this especially bearing in mind that Awang despite everything, according to the Penghulu, was claiming possessory title and if this was so this was of course a convenient way for the defendant to avoid Awang should he have cause to dispute the title later. As to the time of purchase this could have been an exaggeration because the defendant said he had had possession of the land for the last 19 years. This would have taken him back to before the war to 1938. But it must have been well-known to the kampong people that proof of *long* possession was essential to possessory title. In the circumstances people would have naturally tended to exaggerate and I would not be surprised if they did. After all, the difference between 1942 or so and 1938 or so was not very great and the time stated was merely an approximation. The same could almost equally be said for the enquiry in respect of Lot 1318. There the defendant and his father were present although the defendant has repudiated this. The land was originally Mek Nik's from whom the plaintiff said the land was bought. Mek Nik, according to the Penghulu, died *after* the war. There was nothing to suggest that her demise could not have been after 1942. There was a suit taken by her son Mat Amin, defendant's father, in 1954 of Mek Nik's estate wherein this land was transmitted to Mat Amin. It was possible that for some reason or other known to the plaintiff and the defendant and the defendant's father, the plaintiff and the defendant did not attend the suit inadvertently or by design. It was unlikely to be inadvertently because then the father on the assumption that he had acted in the interest of his son and daughter-in-law would have the land recorded in the name of the defendant or the plaintiff as the case may be, if that was possible. It was more likely, in my view, to have been by design which was probably what happened. One of the reasons was in all probability because the plaintiff and the defendant might not have the money to file the suit but the father had. And or because there might be other children of Mek Nik who might be old but with children themselves who would be the natural claimants of the estate of Mek Nik on their death. One must accept that even a gap of one generation in the line of succession can create problems as to proof of title to property. What better thing for the defendant and the plaintiff to do then than to have the land quickly transferred to their father who would then transfer it to the son and daughter-in-law whenever they could pay the father back. Otherwise, I do not see why the suit was filed relatively soon after about the time of Mek Nik's death when among Malays it would usually take 20 or 30 years or never at all. In such a case it would have been awkward for the defendant to say at the Land Scheme Enquiry that he had purchased the land from Mek Nik when Mek Nik had died and the land had not been transmitted to him but to his father instead. In the circumstances although it would be morally wrong but it would be technically right for the defendant to say he had "bought" the land from the father. In fact, in the circumstances in which the land had already been transmitted to the father earlier, it was, like the previous case, more correct for him to say and the collector to record, that he bought it from the father although he could just as well have said that he bought it from Mek Nik as from Mat Amin, his father. And equally as previously, in respect of this lot the time of purchase was merely an approximation and there could have been a certain amount of exaggeration. One other fact must also be not forgotten. The defendant in his pleading as one will recall claimed that he inherited these lands from his grand-parents or grand-father. The inference is therefore irresistible that these lands he said he bought, at the enquiry, could not but refer to the land he and the plaintiff bought *after their marriage*. I believe, subject to the qualification which I have just said, what the defendant said at the enquiry was consistent with the truth because it was consistent with the evidence of the plaintiff and also because there was as yet then no pending cause which would have provided the defendant with the necessary reason for wanting to twist the facts. These facts in P(1), P(2), P(3) and P(4) and particularly P(1) & P(3) which are recordings of the Land Scheme Enquiry are vital to the plaintiff because in so far as they came from the defendant himself they merely corroborated in no uncertain terms her testimony that she bought these lands and she had merely asked her husband to record that fact at the enquiry. It is against these backgrounds and seemingly unquestionable fact that I think that any attempt to discredit the plaintiff or the suggestion to say that the subject matter of the *Harta Sepencarian*

was only one and not two pieces of land, must be viewed. Thus it was said by the defendant that the plaintiff had told the Penggawa in a settlement bid that she wanted to exchange her own rubber land with the one for the disputed Lot 1483 *and that she had not mentioned about Lot 1318.* But in the face of the defendant's own evidence at the enquiry that he had bought these lands and this took place, from the plaintiff's evidence and the surrounding circumstances, after their marriage, how could it ever be true that the defendant had never discussed with the Penggawa the fate of Lot 1318. I would venture to say that the Penggawa had said only half the truth because he said: "There was a discussion regarding the land belonging to the plaintiff". But in the absence of evidence as to who prompted it, how did the rubber land come into the picture? If it had been raised by the defendant it was most unlikely that she would not have mentioned Lot 1318, having also bought it during the marriage. If she had not mentioned it then it would not be unreasonable to expect and to assume that the Penggawa being anxious to settle the dispute between the parties would have done so, because how conceivably would he otherwise have come to the conclusion that the plaintiff's rubber land was suitable for the purpose of the exchange with Lot 1483. Any reasonable person in the circumstances of the Penggawa would have asked the plaintiff, knowing that the point of dispute centred principally on the house supposedly owned by both but on the land registered in the defendant's name, and the plaintiff insisted on having the house and the Penggawa himself had advised that the house should not be uprooted from the land, whether the defendant would agree to exchange with another land of the plaintiff and therefore the natural and obvious thing for the Penggawa to do then was to find out whether the plaintiff had lands at all and if so what type and where they or it was situated. And naturally the existence of Lot 1318 would, quite unavoidably and inevitably, have been raised by either the plaintiff or the defendant or even the Penggawa himself who would normally know the lands in his own area. I believe that the Penggawa tried his best to show that he was impartial when in fact and in truth he was not, but that was not unexpected, if only it is remembered that the initiative to have the matter settled with the Penggawa was taken not by the plaintiff but by the defendant himself.

I do not think I need elaborate further on the evidence, especially on the credibility of witnesses except to say that as far the Penghulu, D.W.(3), was concerned he was frank enough to admit after very thorough and lengthy cross-examination that he did not know anything about these lands except what the defendant told him.

In my view the defendant had not rebutted the plaintiff's claim of *Harta Sepencarian* and I would therefore enter judgment for the plaintiff with costs and make the order in terms of the prayer.

Judgment for the plaintiff.

Solicitors: *Dzaiddin & Co.; Mohamed Yaacob & Gomez.*

PUBLIC PROSECUTOR v. PUA KIA SING & ANOR.

[A.Cr.J. (Ong Hock Sim F.J.) January 17, 1977]
[Kuala Lumpur — Selangor Criminal Appeal No. 119 of 1975]

Criminal Law and Procedure — Robbery with deadly weapon — Whether s. 397 Penal Code, creates offence — Whether s. 34 Penal Code applies in construing s. 397 — Sentence — Penal Code, ss. 34, 392 and 397.

In this case the respondents had been charged under sections 392 and 397 of the Penal Code and acquitted. The Public Prosecutor appealed.

Held: (1) the learned President of the Sessions Court had most carefully dealt with the case and come to a proper conclusion upon the evidence;

(2) section 397 of the Penal Code does not create any offence and section 34 of the Code cannot therefore be invoked for the sole purpose of administering the additional penalty of whipping upon persons involved in the offence charged but not armed with any deadly weapon. Section 34 has no application in the construction of section 397.

Cases referred to:-

(1) *Subramaniam & Anor* v. *Public Prosecutor* [1976] 1 M.L.J. 76.

(2) *Rex v. Yeo Kim Watt* [1946] M.L.J. 155.

(3) *Lee Wai Kam* v. *Public Prosecutor* [1976] 2 M.L.J. 19.

CRIMINAL APPEAL.

Abdul Razak bin Ibrahim (Deputy Public Prosecutor) for the appellant.

Respondents absent.

Ong Hock Sim F.J.: This is an appeal by the Pendakwa Raya from the decision of the learned President, Sessions Court, Kelang acquitting and discharging the respondents of a charge under sections 392 and 397 of the Penal Code. The charge reads: —

"That you on December 10, 1974 at about 4.45 p.m., at Batu 1½ Jalan Kapor, in the District of Kelang, in the State of Selangor, in furtherance of common intention under section 34 of the Penal Code, committed the theft of one Seiko wrist watch valued at $100 and cash $130 belonging to one Loh Kian Kiong (m), and in committing the theft, you voluntarily caused wrongful restraint to the said Loh Kian Kiong and thereby committed the offence of robbery and at that time you were armed with a deadly weapon, to wit, a bearing scraper, and you have thereby committed an offence punishable under sections 392 and 397 of the Penal Code."

The respondents were absent and apparently they had not been served with the Notice of Appeal. The learned Deputy Public Prosecutor asked me to treat the appeal as an application for extension of time to file an appeal. I see no point in doing so, as I am satisfied from the record that the learned President had most carefully dealt with the case and come to a proper conclusion upon the evidence.

In my view section 397 of the Penal Code does not create any offence and section 34 cannot therefore be invoked for the sole purpose of administering the additional penalty of whipping upon others involved in the offence charged. Section 397 reads: —

"If at the time of committing or attempting to commit robbery, *the offender is armed* with or uses any deadly weapon, or causes grevious hurt to any person, or attempts to cause death or grevious hurt to any person, *such offender shall be liable* to be whipped, *in addition to any other punishment* to which he may be liable under any other section of this Code."